IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 92 OF 2000.

Union of India through
Shri A. D'Costa,
Superintendent,
Central Excise & Customs,
Panaji, Goa. ... Appellant.

Versus

1. K.D. Naik, Block No.
   B 727, Ward C, Housing
   Board Colony, Vivek
   Nagar, Kumpta,
   District Karwar,
   Karnataka State.
2. Mohammed R. Adamsab,
   Kotebagil, Chandavar,
   Kumpta, District Karwar,
   Karnataka State. ... Respondents.

Mr. A.P. Lawande, Public Prosecutor for the Appellant.

Mr. Jos Peter D'Souza, Advocate for the Respondents.

Coram: P.V. KAKADE AND
P.V. HARDAS, JJ.

Date: 26th November 2002.

ORAL JUDGMENT (PER HARDAS, J.)

The appellant/complainant has filed the present appeal challenging the acquittal of the respondents/original accused 1 and 2 for an offence punishable under Section 8 read with Sections 17, 18 and 21 of the N.D.P.S. Act, as passed by the Special Judge, N.D.P.S. Court, Mapusa, by Judgment dated 20th October 1999, in Special Criminal Case No. 9 of 1998.

2. The facts necessary for the decision of the appeal are set out hereunder:-

P.W.12 A. D'Costa, who was working as Superintendent of Customs and Central Excise at Margao, received information on telephone on 10th January 1998 from Shri Cruz, Inspector of Central Excise and Customs that there was information that narcotic drugs were hidden in room no. 209 of Sunaina Hotel at Margao. On receiving the said information, P.W.12 D'Costa went to his office where he received the sealed envelope containing the information. Shri Cruz also informed P.W.12 D'Costa that there are two occupants in the said room. The information furnished by Cruz is at Exhibit P.W.12/A. P.W.12 D'Costa informed the Assistant Commissioner Shri Monteiro. P.W.12 D'Costa alongwith the other Officers of the Customs and Central Excise went to Hotel Sunaina. Before proceeding to Hotel Sunaina, P.W.12 D'Costa had handed over the seal with the inscription "South Goa Anti Smuggling Unit Margao" to P.W.10 Anil Wanare, an Inspector of the Central Excise at Panaji. P.W.10 Wanare issued a receipt for the same, which is at Exhibit P.W.10/A. The Officers of the Central Excise and Customs reached Hotel Sunaina, which was situated just behind Kadamba Bus Stand. The presence of two panchas P.W.8 Sarvesh Govekar and one Stanley Cardozo were arranged. P.W.12 D'Costa knocked on the door of the room no. 209 and in response to the knock, one middle aged man with dark complexion having a beard opened the door. On seeing

the Officers of the Central Excise and Customs, the said person attempted to close the door but the other Officers, namely, Pandey and John prevented the said person from closing the door and as a result of which the person inside the room fell down and received an injury to his head. On entering the room P.W.12 D'Costa introduced himself to the two occupants of the room, who are said to be original accused 1 and 2 and respondents in the present appeal. The two panchas P.W.8 Govekar and Cardozo, who is the Receptionist at Sunaina Hotel, were also introduced. P.W.12 D'Costa informed both the accused that he had information that narcotic drugs were concealed in the room and told them that the Officers of the Central Excise and Customs would search the room. The Officers offered themselves for search by the accused but the accused declined the said offer. The accused were also apprised that their personal search could be taken in the presence of a Magistrate or a Gazetted Officer. Both the accused stated that they preferred to be searched in the presence of a Gazetted Officer and, accordingly, P.W.12 D'Costa asked P.W.10 Wanare to call P.W.11 Anthony Fernandes, who is a Gazetted Officer and, at the relevant time, was working as Superintendent of Customs and Central Excise at Margao.

3. After the arrival of P.W.11 Fernandes,

respondent no. 1 was searched and in his shirt pocket a white polythene packet having white powder was found. On the personal search of respondent no. 2, they found a wallet containing Rs. 55/-. The wallet was returned to respondent no. 2. Thereafter the search of the room was undertaken and underneath the cot a polythene carry-bag of greenish colour was found. On opening the said bag two packets containing white powder was noticed. A pinch of the white powder from both the bags as well as from the packet found in the pocket of the accused no. 1 was tested with the testing kit and it tested positive for morphine. Prior to this testing, the narcotic drug found was weighed and it was found to weigh 2.080 kgs.. The packet which was found in the pocket of accused no. 1 weighed 10 gms.. Two samples from each packet were taken for the purpose of analysis. The samples were sealed with the seal having the inscription "Anti Smuggling Unit South Goa Margao". The remaining quantity of the drug which weighed 2.030 kgs. was then sealed and put in a box. All, the envelopes and the box, were signed by the panchas and P.W.10 Wanare. The accused no. 1, who had an injury, was taken to the doctor Shri Dessai alongwith the Officers and Pancha No. 2 Govekar. After returning from the doctor, the panchanama continued and was concluded at 1.00 a.m. The Officers then again offered themselves for search by the accused, which was

declined. Thereafter the raiding party, panchas and the two accused came back to the Office at Margao and at 1.30 a.m. P.W.12 D'Costa issued summons to both the accused which are at Exhibit P.W.12/B/Colly. The statements of both the accused were recorded and the same are at Exhibits P.W.12/C and P.W.12/D. An intimation under Section 57 of the N.D.P.S. Act was sent to the Superior by P.W.12 D'Costa and the same is at Exhibit P.W.12/G. The D.R.I.-1 Information Report is at Exhibit P.W.12/H and the D.R.I.-2 Seizure Report is at Exhibit P.W.12/I. After the raid the seal had been handed back to P.W.12 and the receipts are at P.W.12/J/Colly. The panchanama of the entire sequence of events was drawn and is at Exhibit P.W.8/A. P.W.12 D'Costa had handed over the sealed packets to P.W.9 Prasad Amonkar, who, in turn, had handed them over to P.W.2 Fatima Noronha, who was the warehouse keeper. The samples were analysed by P.W.1 Mahesh Kaissare, who opined that the samples analysed by him tested positive for morphine salts. His report is at Exhibit P.W.1/B. On receipt of the report from the Analyser P.W.12 D'Costa filed a complaint in the Court.

4. The learned Special Judge, N.D.P.S. Court, vide Exhibit 7, framed a charge against both the accused for an offence punishable under Section 8 read with Sections 17, 18 and 21 of the N.D.P.S. Act. The

accused denied their guilt and claimed to be tried. The prosecution in support of its case examined in all 12 witnesses.

5. The learned Special Judge acquitted the accused on the following grounds:-

(a) that it was extremely doubtful that the narcotic drug had been seized from the possession of the accused on 10th January 1998;

(b) the prosecution had not been able to establish that the respondents were occupants of room no. 209 of Sunaina Hotel;

(c) the provisions of Section 50 of the N.D.P.S. Act had not been followed;

(d) there was no satisfactory evidence that the drugs after their seizure were kept in safe custody and the possibility of tampering could not be ruled out; and

(e) the statements under Section 67 alleged to have been made by the accused were retracted and, therefore, could not be of any assistance to the prosecution.

6. Mr. Lawande, the learned Public Prosecutor appearing on behalf of the appellant, has urged before us that non-compliance of Section 50 would be applicable in respect of the personal search of the accused no. 1. The recovery of the drugs from the room cannot be faulted with and Section 50 would not apply to the recovery of drugs from the room. It is next urged before us by the learned Public Prosecutor for the appellant that merely because P.W.8 Govekar was a relative of a sepoy working in the Central Excise and Customs, the entire raid is not rendered doubtful. It is urged before us that on the basis of the evidence of P.W.4 John Miranda, the Receptionist of Hotel Sunaina, the presence of accused 1 and 2 in room no. 209 of the said hotel is established. It is also urged before us that on the basis of the panchanama at Exhibit P.W.8/A and the evidence of the Officers of the Central Excise and Customs Department, the seizure of the drugs is established. In such circumstances it is urged that reliance could be placed on the statements of the accused under Section 67 of the N.D.P.S. Act as they stand corroborated by the other evidence to convict the accused.

7. Mr. D'Souza, the learned counsel appearing on behalf of the respondents, has urged before us that the pivot of the prosecution case is the seizure of the

drugs from room no. 209 of Sunaina Hotel. According to the learned counsel for the respondents, even if it is assumed that room no. 209 was occupied by the accused, still the prosecution could not benefit from it, unless the prosecution establishes, by means of cogent and reliable evidence, that the drugs came to be seized from room no. 209 of Sunaina Hotel. The learned counsel for the respondents has also urged before us that the statements recorded under Section 67 of the accused were retracted at the earliest opportunity when they had moved their application for bail. Moreover, it is urged before us that though the statements of the two accused are not stereotyped, yet the material portion is identical, thereby raising an inference that the statements were not voluntarily given by the accused.

8. Both the learned counsel agree that the pivot of the prosecution case is in respect of seizure of the drugs from room no. 209 of Hotel Sunaina. The learned trial Court at paragraph 27 of its Judgment has given reasons as to why it held that Section 50 had not been complied with. The trial Court has held that P.W.11 Fernandes, who was a Gazetted Officer, in whose presence the drug was found on the person of the accused, has not endorsed the panchanama. He has also not endorsed on any of the envelopes containing the

drugs. The property which was seized has not been identified by P.W.11 Fernandes. The evidence of P.W.10 Wanare and P.W.11 Fernandes is contradictory inasmuch as P.W.11 Fernandes states that the bag underneath the bed was also seized in his presence whereas, according to P.W.10 Wanare, the said polythene bag came to be seized after P.W.11 Fernandes had left. The learned trial Court has observed in the said paragraph that it could be safely concluded that the provision of Section 50, which was of mandatory nature, was made as a mere formality. It is true that Section 50 would not apply to the search of a room. It is equally true that the evidence of the prosecution in respect of search and seizure of drugs on the person of the accused is wholly unsatisfactory. The learned trial Court has given reasons for holding why Section 50 had not been complied with. However, the learned trial Court is not correct when it holds that Section 50 would be applicable for search of the room. Therefore, with the assistance of the learned counsel for the parties, we have scanned the evidence of the prosecution witnesses and the documents to see if the prosecution has been able to establish by cogent and reliable evidence that the polythene bag was seized from room no. 209 of Sunaina Hotel.

9. In this regard it will be useful to make a

reference to the evidence of P.W.8 Govekar, the panch witness. The evidence of P.W.8 Govekar is that underneath the cot there was a plastic bag and inside it there were two separate bags containing white powder. He further states that the Officers then tested the contents of the bag and said that it was a narcotic drug. After drawing the samples, the samples were sealed and signatures of the panchas were taken and the remaining quantity was also sealed and signatures of the panchas were taken. He further states that the panchanama was concluded at 1.00 a.m.. In the cross-examination he has admitted that his brother Ravindra is working as a sepoy in the Customs Department and Ravindra was present during the raid. At page 5 of the panchanama, Exhibit P.W.8/A, it is stated:-

> "The above names pancha no. 2 Shri alongwith S/Shri A. D'Costa and John Cruz had taken Shri K.D. Naik at 22.05 hrs. on 10.1.98 for medical treatment to the injury caused to Shri K.D. Naik."

It is extremely significant that the name of pancha no. 2, that is, name of Govekar was not written and space was kept for writing his name. It is an admitted fact that in the beginning of the panchanama the name of P.W.8 Shri Sarvesh Govekar is written. In this regard an explanation is offered by P.W.10 Wanare. He states

that the blank portion was meant for writing the name of pancha no. 2 but at that time accused no. 1 was complaining of pain and, therefore, he was sent to the doctor and, therefore, the name of the pancha no. 2 remained to be written. In the cross-examination P.W.10 Wanare states that he had commenced writing the sentence, which is referred to by us above, prior to the accused being sent to the doctor. He further states that he had written the sentence only upto the word "Shri" and thereafter as the accused was sent to the doctor, he had stopped writing the panchanama. After the return of the accused and the Officer he again commenced writing the panchanama. He states in the cross-examination that he was not well conversant with the name of pancha no. 2. Thereafter again he states that he was aware of the name of pancha no. 2. He admits that he had written the name of pancha no. 2 at the beginning of the panchanama. He also admits that the latter part of the sentence was written by him after the accused was brought back after being examined by the doctor. He further states:-

> "It skipped my mind to write the name of the second pancha".

According to us, the learned trial Court has rightly disbelieved this explanation. The explanation offered by P.W.10 for not writing the name of pancha no. 2 and more significantly leaving a blank space tasks human

credulity for its acceptance. The explanation which is offered by P.W.10 Wanare is obviously an afterthought and is unbelievable. If the panchanama was stopped after writing the word "Shri", it is inconceivable that P.W.10 Wanare would then leave a blank space and continue with the remaining sentence after the accused was brought back from the medical officer. The panchanama contains many corrections and overwritings which have been initialled and it is inconceivable that this portion escaped the attention. In fact at page 5 there are about 10 initials of the Officer evidencing the various corrections made in the panchanama. Mr. D'Souza has rightly pointed out that leaving a blank space for the name of pancha no. 2 could be as a result of the fact that the pancha no. 2 was never present at the time of the raid and his signatures were obtained subsequently on the next day. P.W.8 Govekar was the relative of the sepoy working in the Central Excise and Customs and, according to us, the learned trial Court was not wrong in labelling him as a pliable witness.

10. There is a further discrepancy which reinforces the observations made by us above. P.W.8 Govekar in his cross-examination states that the sealing and signing of the envelopes and box were done before going to the doctor. He is categorical in

mentioning the date as 10th January 1998 before 22.05 hours. He further states that he had put the date beneath the signature on all the envelopes and the box. He also states that he had put the date as 10th January 1998 on the envelopes and the box. Admittedly the drugs were sealed and signed by the panchas before the accused no. 1 was sent to the doctor. No sealing or signing of the envelopes or the box was done after the return of the accused no. 1 from the medical officer. P.W.8 Govekar further admits that he had signed the envelopes and the box during the process of writing of the panchanama. When confronted with the signatures on the envelopes and the box P.W.8 Govekar admitted that he had put the date as 11th January 1998 beneath his signature. The same date appears on the two autopress boxes containing the white powder. The evidence of P.W.10 Wanare suggests that the samples were sealed and signed by the panchas before the accused no. 1 was taken to the medical officer. Admittedly, the accused no. 1 was taken to the medical officer on 10th January 1998 at 22.05 hours. In the cross-examination P.W.10 Wanare states:-

> "The date on seeing Exbt. B I say the dated signature is 11.1.98 of the panchas. I agree that the date is not 10.1.98 against the signature of the panchas. The dates were written in my presence. I saw them writing the date as 11.1.98. I know that the date otherwise correct should be 10.1.98 and not 11.1.98".

In the cross-examination he has further cemented what is contended by the learned counsel for the accused before us that the signatures of the panchas were taken after sealing but prior to their leaving with the accused no. 1 to the medical officer. He further states that the sealing and signing was done on 10th January 1998. He also admitted that there was not a single signature bearing the date 10th January 1998. P.W.12 D'Costa has also admitted in the cross-examination that none of the envelopes or the box were signed after coming from the doctor. He has further admitted that it was on 10th January 1998 when the panchas had signed the envelopes and the box. He has also admitted that all the signatures on the envelopes and the box were taken on 10th January 1998 between 9.30 p.m. to 10.00 p.m.. He admitted that the two white polythene bags, which were sealed and put in the box, also bear the date beneath the signatures of the panchas as "11th January 1998".

11. It is urged before us by the learned Public Prosecutor for the appellant that undue importance need not be attached to the panchas putting the date as 11th January 1998 beneath their signatures as the panchanama was concluded on 10th January 1998 at 1.00 a.m.. This submission deserves to be outrightly rejected. The evidence on record clearly suggests that

all the sealing and the signatures were done on 10th January 1998 and, therefore, the date 10th January 1998 ought to have been written beneath the signatures of the panchas and not 11th January 1998. If the panchanama concluded at 1.00 a.m. on 11th January 1998, in normal course, the panchas may have put the date 10th January 1998 instead of 11th January 1998 but the panchas could never have put the date as 11th January 1998 beneath their signatures in respect of seizures which were done on 10th January 1998. It is, therefore, clear to us that the signatures of the panchas had been obviously obtained and in fact the sealing had been done not on the spot itself but subsequently on 11th January 1998. The learned trial Court has rightly come to the conclusion that the prosecution has not been able to establish the seizure of the drugs from the room no. 209 of Sunaina Hotel on 10th January 1998. It is indeed a sad reflection on the prosecution that instead of sealing the drugs immediately at the scene of offence itself, the drugs were sealed subsequently by obtaining the signatures of the panchas and a false document like the panchanama is prepared evidencing the sealing on the spot. The learned trial Court has also held that the drugs were in the custody of P.W.12 D'Costa for nearly 9 hours and that there is a possibility of tampering. Once it is established that the drugs were not sealed immediately

at the place where they were seized and they are sealed subsequently and a false document is prepared, the entire fabric of the prosecution case is destroyed and no conviction can be based on the evidence of the Officers conducting the search. The entire prosecution case loses its credibility as also its witness and in such circumstances there is no other alternative for the Court but to jettison the prosecution case. According to us, the trial Court has rightly disbelieved the seizure of the drugs on 10th January 1998. According to us, there is no perversity in the reasonings of the learned trial Court and we see no reason to take a view different from the view taken by the learned trial Court.

12. Once it is held by us that there is no satisfactory, reliable and cogent evidence in respect of the seizure of the drugs on 10th January 1998, the evidence of the prosecution in respect of the accused being in occupation of room no. 209 of Sunaina Hotel pales into insignificance. Similarly even if we assume that the statements under Section 67 of the N.D.P.S. Act, which are at Exhibits P.W.12/C and P.W.12/D, are proved to be voluntary statements, the same cannot be used as a foundation for basing the conviction in the absence of any cogent and reliable evidence. Further more, the confessions came to be retracted at the

earliest possible opportunity. In the absence of any other evidence, the prosecution cannot successfully press into aid the confessional statements of the accused for their conviction. The learned trial Court has also disbelieved the voluntariness of the confessions.

13. There is one more aspect and that is that P.W.12 D'Costa had handed over for safe custody the drugs sealed to P.W.9 Amonkar. P.W.9 Amonkar does not identify the packages in the Court. The prosecution, according to us, has also not been able to establish the nexus between the drugs which were sealed and ultimately analysed by P.W.1 Kaissare.

14. This is an appeal against acquittal. The learned trial Court has given reasons for arriving at a finding and acquitting the accused. The reasons, according to us, do not appear to be perverse. After perusal of the evidence and the documents, we see no reason to take a view different from the view taken by the learned trial Court and, according to us, the learned trial Court was perfectly justified in arriving at the finding and acquitting the accused. We, thus, see no merit in the present appeal and the same deserves to be dismissed.

15. Criminal Appeal is, accordingly, dismissed. Bail Bonds of the accused stand cancelled.

(P.V. KAKADE)
JUDGE.

(P.V. HARDAS)
JUDGE.

ed's.